

Office for Foreign Affairs, July 4, 1785

OFFICE FOR FOREIGN AFFAIRS, *July 4, 1785.*

The Secretary of the United States for the Department of Foreign Affairs, to whom was referred a Copy of the Convention respecting French and American Consuls, REPORTS,

THAT the convention, of which the abovementioned is a copy, having been formally executed by French and American plenipotentiaries, nothing is wanting to perfect that compact, but the ratifications specified in the 16th article.

The only question therefore that remains to be decided, is, whether Congress ought to ratify this convention.

To decide this question properly, it appears necessary 1st, to recur to the powers and instructions given to their minister on this subject, and enquire whether he has pursued them essentially; and 2d, whether in case of deviations, they are of such a nature as to justify a refusal to ratify.

It is to be observed, that on the 25th January, 1782, Congress “RESOLVED, That the minister plenipotentiary of the United States at the court of Versailles, be, and is hereby authorised and *instructed*, to enter into a convention with his most Christian Majesty, on the part of the United States, for the establishment of consular powers and privileges ACCORDING to the scheme hereunto subjoined; unless it shall be deemed by his most Christian Majesty more expedient that the same should be executed in the United States.

“That the said minister plenipotentiary use *his discretion* as to the *words or arrangement* of the convention; confining himself to the *matter* thereof in ALL RESPECTS, except as to so much of the **SIXTH** article, as relates to the erection of a chapel, taking care that reciprocal

Library of Congress

provision be made for the recognition of the consuls and vice consuls of the United States, and for the admission of persons attached to the consulate to the privileges stipulated in the 5th article, in a manner most conducive to expedition, and free'st from difficulty.”

This is the only instruction, as well as the only authority given on the subject, to the American minister, that your secretary finds. **SCHEME. TITLE.**

Convention between his most Christian Majesty and *the United States of North-America*, for defining and regulating the functions and privileges of consuls, vice-consuls, agents and commissaries. **CONVENTION. TITLE.**

Convention between his most Christian Majesty and the THIRTEEN *United States of North-America*, for the purpose of determining and fixing the functions and prerogatives of their respective consuls, vice-consuls, agents and commissaries.

The stile of the confederacy being “The United States of America,” the scheme and the convention are both erroneous, so far as they both add the word *North*.

But the title of the convention departs essentially from that of the scheme, inasmuch as it limits the compact to the *thirteen* United States of America, and consequently *excludes* from it all such other states as might before the ratification of it or in future be created by, or become parties to, the confederacy: whereas the words in the title of the scheme, **UNITED STATES OF NORTH-AMERICA**, would, if used, have comprehended them all. **A**

(2) **SCHEME.**

First Article. **IT** shall be the duty of the consuls of his most Christian Majesty *to present their commissions, in the first instance, to the United States in Congress assembled*, by whom an act shall be made, recognizing them as such. This act shall be delivered by the consuls to the supreme executive power of the state or states to which they may be sent. Two copies of the *exequatur*, that is, a public notification of the quality of the consuls, shall

Library of Congress

thereupon issue from the supreme executive power, without fees or perquisites of office, one to be retained by the consuls, the other to be published in one or more gazettes. This being done, the pre-eminences, &c. shall be allowed to them, &c.

CONVENTION.

First Article. The consuls and vice-consuls nominated by his most Christian Majesty and the United States, shall be bound *to present their commissions on their arrival in the respective states according to the form which shall be there established*. There shall be delivered to them, without any charges, the *exequatur* necessary for the exercise of their functions; and on the exhibition they shall make of the said *exequatur*, the governors, &c. having authority in the ports and places of their consulates, shall cause them to enjoy as, soon as possible, and without difficulty, the pre-eminences, &c.

The scheme expressly directs, that their commissions shall in the first instance *be presented to Congress*, but the convention by omitting this, seems to intend something else—it indeed directs that they shall *present their commission on their arrival in the respective states according to the form “qui s’y trouvera etablis,” which shall be there found established*; but whether established by the *state* or by *Congress* is undecided.

The 2d articles in both appear to be alike in substance.

SCHEME.

Third Article. Consuls and vice-consuls shall be subjects or citizens of the power appointing them, and interdicted from all traffic or or commerce for their own or anothers benefit.

CONVENTION.

Library of Congress

This Article is wholly omitted in the convention, and that omission is an *essential*, though perhaps not *in itself* a very important deviation from the scheme.

The 4th article in the scheme, and the 3d in the convention respecting agents, differ essentially only in this, that the former has these words, "*nor exact any fees or reward under any pretence whatever,*" whereas the latter seems to limit that prohibition, by these words, "*and without power to exact from the SAID MERCHANTS, any duty or emolument whatever, under any pretext whatsoever.*"

The 5th article in the scheme, and the 4th in the convention have no material difference.

SCHEME.

Sixth Article. Consuls and vice-consuls, in places where there are no consuls, may have a chapel in their houses, for the celebration of divine service, according to their religious profession. And his most Christian Majesty and the United States, shall cause particular care to be taken that no obstacle or hindrance be thrown in the way of the funeral obsequies or ceremonies observed towards the deceased of either nation.

CONVENTION.

(3) This article is omitted in the convention. By the instruction given to the minister, that matter seems to have been left to his discretion. The omission however, appears important to your secretary from this consideration, that although the Catholic religion may be freely and publicly professed and exercised in the United States, yet the Protestant religion has no legal toleration in France. This omission therefore is a departure from the line of reciprocity. The 7th article in the scheme, and the 5th in the convention are much alike. The 8th article in the scheme, and 6th in the convention are similar. The 9th article in the scheme, and the 7th in the convention also correspond.

SCHEME.

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Extract from 10th article *on Average*. "If a subject of France and a citizen of the United States be jointly interested in the cargo, the damage shall be settled by the tribunals of the country, not by the consuls or vice consuls. But where subjects, citizens of their own nation are alone interested, the consul or vice-consul shall then chuse experience persons of their respective nations to settle the same."

CONVENTION.

Extract from 8th article *on Average*. "If a subject of his most Christian Majesty and a citizen of the United States, are interested in the said cargo, the average shall be fixed by the tribunals of the country, and not by the consuls or vice consuls; *and the tribunals shall admit the acts and declarations, if any should have been passed before the said consuls and vice-consuls.* But when only the subjects of their own nation *or foreigners* shall be interested, the respective consuls or vice-consuls, *and in case of their absence or distance, THEIR AGENTS furnished with their commission, shall officially* nominated skilful persons of their said nation to regulate the damages and averages."

The convention here appears to differ materially from the scheme in *three* respects. 1st. As it provides for the admission in evidence by our tribunals of acts and declarations passed before consuls and vice-consuls, respecting the matter in controversy, and consequently opens a door to *exparte* affidavits. 2d. The scheme confines the jurisdiction of consuls and vice-consuls to cases where none but their own people are concerned; whereas the convention extends it to *foreigners*. 3d. The scheme authorises none but consuls and vice-consuls to appoint persons to settle the damages in question; but the convention makes an ulterior provision, and authorises their agents *ex officio* to do it in certain cases.

The 11th article in the scheme, and the 9th in the convention are not materially different.

SCHEME.

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Extract from 12th Article. "They" (Consuls and vice-consuls) "may cause to be arrested and sequestered, every vessel carrying the flag of their respective nations. They may cause to be arrested and detained in the country, sailors and deserters of their respective nations, or cause them to be transported therefrom." **CONVENTION.** Extract from 10th Article. "They may cause to be arrested every vessel carrying the flag of their respective nation. They may sequester them, *and even send them back* respectively, from the United States to France, or from France to the United States. They may cause to be arrested without difficulty, every *captain, master, sailor, or passenger* of their said respective nation. They may cause to be arrested and detained in the country, the sailors and deserters of their respective nations, or send them back or transport them out of the country.

These articles differ in these respects.

The scheme does not authorise the **B (4)** consuls *to send vessels back*, but the convention does. The scheme does not authorise them to arrest *captains and masters* of vessels. but the convention does. The scheme does not authorise them to arrest *passengers*, but the convention does.

SCHEME.

Thirteenth Article. All offences committed in France by a citizen of the United States against a subject of his most Christian Majesty, shall be enquired into and punished according to the laws of France, those committed in any one of the United States by a subject of his most Christian Majesty against a citizen of the United States, shall be enquired into and punished according to the laws of such state. But offences committed in France by a citizen of the United States against a citizen of the United States, or committed in any one of the United States, by a subject of his most Christian Majesty, against a subject of his most Christian Majesty shall be subject to the jurisdiction of the consuls and vice-consuls of France, or the United States as the case may be.

CONVENTION.

Eleventh Article. In cases where the respective subjects shall have committed any crime, they shall be amenable to the judges of the country.

These two articles differ only in this, that the one in the scheme gives cognizance of certain offences to consuls and vice-consuls, but the one in the convention gives that cognizance to the judges of the country.

The 14th article in the scheme, and the 12th in the convention, differ only in this, that the former refers certain *offences*, disputes and differences to the jurisdiction of the consuls and vice-consuls; whereas the latter is silent as to *offences*, and omits making any mention of them.

The 15th article in the scheme, and the 13th in the convention are alike.

SCHEME.

Sixteenth Article. The subjects of his most Christian Majesty and the citizens of the United States shall be exempt from all personal services in the place of their residence, either in France or the United States as the case may be. Whensoever any person in France or the United States as the case may be, shall claim any privilege or exemption of a subject of his most Christian Majesty or of the United States, before any judge, tribunal or officer whatsoever, a certificate of the consul or vice-consul of the district, containing his name, surname, and the place of his residence, and the affidavit of the person claiming such privilege or exemption, that he is a subject of his most Christian Majesty or of the United States, as the case may be, shall be sufficient evidence thereof, unless the contrary shall manifestly appear.

CONVENTION

Library of Congress

Fourteenth Article. The subjects of his most Christian Majesty and those of the United States, who shall prove that they belong to the body of their respective nations, by the certificate of the consul or vice-consul of the district, mentioning their names, surnames, and place of their settlement, as inscribed in the registers of the consulate, shall not lose *for any cause whatever*, in the respective domains and states, *the quality of subjects of the country of which they originally were*, conformably to the 11th article of the treaty of amity and commerce, of the 6th February, 1778, *of which the present article shall serve as an interpretation* in case of necessity, and the said subjects respectively shall enjoy in consequence, exemption from all personal service in the place of their settlement.

(5) These two articles vary from each other essentially, *first*, in that the certificate of the consul is by the convention made the *sole* and *conclusive* proof of nationality, whereas the scheme requires, also the affidavit of the party, and makes that joint evidence conclusive only in cases where *the contrary shall not manifestly appear*— *secondly*, in that the convention declares that persons having such certificates *shall not lose for any cause whatever, the quality of subjects of the country of which they originally were*; whereas the scheme by not giving such operation to those certificates leaves such persons within the reach of *naturalization*. *Thirdly*, in that the convention makes this article auxiliary to the 6th article of the treaty, by declaring that it shall serve as an interpretation in case of necessity—whereas the scheme does not constitute any connection between this article and the treaty.

There is no difference between the 17th article in the scheme and the 15th in the convention, except that the former refers only to the 3d and 4th articles of the treaty; whereas the latter refers to the 2d, 3d, and 4th.

The convention contains an article, viz. the 16th, which provides for the exchange of ratifications, but there is no such article in the scheme.

Library of Congress

It appeared proper to your secretary thus particularly to state the principal variances between the scheme and the convention, that Congress may the more easily judge how far they correspond. The deviations in question, tho' different in degrees of importance, yet seem to be alike in this, that they depart from the *matter* of the scheme, and not merely from the verbage or arrangement of it.

As sovereigns treat and act with each other by their ministers, it becomes essential that the acts of those ministers should not be obligatory, until after they are ratified; it being reasonable that the sovereigns should have an opportunity of judging, whether their powers have not been exceeded, and whether their instructions have been pursued. A refusal to ratify can therefore be warranted only by one or other of these principles, viz. Either that their ministers have exceeded the powers delegated by their commission, or departed from the instructions given them to limit and regulate the exercise and use of those powers, which are commonly expressed in very general terms.

Hence it becomes important that the sovereign refusing to ratify, should be in capacity to shew clearly what the powers and instructions given were, and also that the treaty or convention in question is not conformable thereto.

In the present case there can be no difficulty because all the power and authority delegated to the American minister, rest entirely on the resolution of the 25th of January, 1782, which in a few words, so blends his authority and his instructions that he could not communicate to the French minister, the one without the other.

Where an open and general commission is given accompanied by private and particular instructions, the one may be shewn and the other reserved—And though a departure from such instructions, is good cause to refuse a ratification, yet more difficulties attend such cases than the present, because the other party being ignorant of the instructions, and relying on the full powers, treats in full confidence and expectation that the proceedings will be ratified.

Library of Congress

But as the French ministers in this instance knew exactly how far the American minister could go, and saw plainly that he was not to depart from the *matter* of the scheme which accompanied, and was referred to in his powers and instructions; they could in case of essential deviations, only expect a ratification *de gratia*, and not *de jure*; and consequently can have no reason to be dissatisfied in case it should be declined.

Thus much appeared necessary to observe, in order to shew that Congress have a right to refuse the ratification in question; but whether it would be politic and expedient to do it, are questions which must be entirely referred to the wisdom of Congress. Your secretary however in order fully to comply with what he conceived to have been the intention of Congress, in referring the convention to him, will now proceed to state the several objections to which in his opinion it is liable. **C**

(6) The convention appears well calculated to answer several purposes; but the most important of them are such, as America has no interest in promoting. They are these,

1st. To provide against infractions of the French and American laws of trade.

2d. To prevent the people of one country from migrating to the other.

3d. To establish in each other's country an influential corps of officers, under one chief, to promote mercantile and political views.

The *first* of these objects is clearly evinced, by the 10th article.

The *second* of these objects though less explicitly, is still sufficiently evident from the 14th article.

The *third* of these objects as it reflects *mercantile* views, is apparent from the general tenor of the convention; and it appears plain to your secretary, that a minister near Congress, consuls so placed as to include every part of the country in one consulate or other, vice-

Library of Congress

consuls in the principal ports, and agents in the less important ones, constitute a corps, so coherent, so capable of acting jointly and secretly, and so ready to obey the orders of their chief, that it cannot fail of being influential in two very important political respects; *first* in acquiring and communicating intelligence, and *secondly* in disseminating, and impressing such advices, sentiments and opinions, of men or measures, as it may be deemed expedient to diffuse and encourage.

These being the *three* great purposes which the convention is calculated to answer; the next question which naturally occurs is, whether the United States have any such purposes to answer by establishing such a corps in France.

As to the 1st. We have no laws for the regulation of our commerce with France, or any of her dominions, and consequently we want no provisions or guards against the infraction of such laws.

As to the 2d. We have not the most distant reason to apprehend or fear that our people will leave us, and migrate either to the kingdom of France or to any of its territories, and consequently every restriction or guard against it, must be superfluous and useless.

As to the 3d. France being a country in whose government the people do not participate, where nothing can be printed without previous licence, or said without being known, and if disliked followed with inconveniences, such a corps would there be very inefficient for political purposes, where the people are perfectly unimportant, every measure to influence their opinions must be equally so—For *political purposes*, therefore we do not want any such corps in France.

As to assisting our merchants, and such other matters as properly belong to consuls, they would answer all those purposes just as well, without these extraordinary powers, as with them.

Library of Congress

Hence it is clear to your secretary that the *three* great purposes which the convention is calculated to answer, are such as the United States have no interest in promoting. Whether France has any such purposes to answer in the United States, and how far this convention may facilitate the pursuit of them, are questions which the discernment of Congress renders it unnecessary for your secretary to discuss.

Your secretary also considers this convention as greatly deficient in reciprocity, inasmuch as by it we are to admit French consuls into all our ports and places without exception; whereas no provision is made for the admission of ours into any of the ports, places and dominions of his most Christian Majesty, except the kingdom of France only. He also thinks that the omission of the article securing to consuls, the right of worshipping in their own way, in chapels, in their houses, is a deviation from reciprocity, especially as that liberty is not only permitted but established here.

(7) But independent of these *general* circumstances and considerations, your secretary thinks the convention is liable to several strong and *particular* objections.

When these states assumed a place among the nations of the earth, they agreed upon and published to the world the stile and title by which they were to be known and called, and your secretary does not conceive that other nations are more at liberty to alter that stile, than the United States are to alter the title of his most Christian, Catholic, or any other Majesty in Europe. He therefore thinks that no act should be ratified by Congress, until every error of this kind is corrected. Though these matters are very unimportant in themselves, yet they become so as precedent; one little liberty unchecked, often smoothing the way for a greater.

The convention directs the consuls on their arrival in the respective states, to present their commissions according to the forms which shall be there found established. Although the *word* *respective* here used, relates to the two countries, and not to the individual states of which our confederacy is composed, yet it still is doubtful whether the form alluded to is to

Library of Congress

be established by Congress or the state to which they may be sent, and at which they may arrive. The like remarks apply to the case of vice-consuls mentioned in the second article.

In countries where the laws alone govern, it should in the opinion of your secretary, be an invariable maxim not to permit any civil power to be exercised in it, but by the citizens of the country legally and constitutionally authorised thereto; and that as few persons as possible, should live exempt in any respect, from the jurisdiction of the laws. In his opinion therefore, none but the immediate representatives of sovereigns ought to have such exemptions—A consul is not of that description. According to the law of nations, ambassadors must be received— but that law does not extend to consuls, and therefore every nation may admit them on their own terms. It is not easy to assign a good reason for granting them a full and entire immunity for their persons, papers, houses and servants, other than such as the free citizens of the country: enjoy as they are protected by the laws, they should be subject to them.

But the convention goes much further. It grants this immunity not only to consuls and also to vice-consuls, but also to all their different officers, and in general to all persons attached to the consulate. Various abuses, difficult to detect, and still more difficult to correct, would naturally attend such extensive exemptions from the process and jurisdiction of our laws; which can only proceed in one open plain direct path, without the aid of those detours and expedients well known and daily practised in absolute governments.

The 5th article, respecting calling upon them for evidence, seems to be an unnecessary departure from our laws. Why should consuls and vice-consuls, be called upon to give evidence in a manner less formal and less coercive than the first and highest officers of our government are.

The 6th and 7th articles establishing consular and *vice-consular chanceries*, create an *imperium in imperio*, which in several respects must clash with the internal policy of these

Library of Congress

states, and with which it is not clear that Congress can authorise any persons to interfere, such as,

1st. Their officers shall discharge the functions of notaries. If by notaries be intended such as are known in this country, they are public officers who can only be appointed in the manner prescribed by the governments of the different states.

2d. All effects left by deceased persons (of their nation) are to be deposited there, and they are to have the *exclusive* right to inventory, liquidate and sell the moveable effects, &c. so left; so that with respect to these matters, not only the executors of the deceased are to be excluded, but our judge of probates is to lose his jurisdiction. And yet consular copies of such wills and acts though unknown to our laws, are to be admitted as evidence in our courts.

3d. If a French merchant having many goods in possession and many debts to **D** (8) pay, should die, his creditors according to this system, are to have no other dependence for payment but the integrity of the consul or vice-consul who alone can take possession of his goods. No action can be brought against these officers, nor any process touch any thing in their houses; so that our courts are so far to lose their jurisdiction, and American creditors in effect their right of action.

4th. Notes given by French men dying here are put on another footing from notes given by our citizens, with respect to evidence. For the convention demands that the *writing and signing* of them shall be known and certified by *two principal merchants of his nation*; which very materially alters our law on that subject.

From these and other circumstances it appears, that this convention will make a strong line of separation between French and American inhabitants in this country.

The 10th article needs no comment. It gives to consuls as complete jurisdiction over French vessels in our harbours, as any of the king's officers could exercise over them

Library of Congress

in the harbours of France. One circumstance however is very striking and merits much attention, viz. their power to *arrest passengers*, which doubtless will be the case whenever passengers attempt to come here in a manner and for purposes not consistent with the ordinances against emigration. And the power to arrest also the captains and masters, is doubtless intended to punish neglects of those ordinances, and to render them very circumspect in their conduct relative to passengers and cargoes.

How far the power of arresting and re-exporting sailors and deserters may operate on emigrants is not difficult to foresee, as the consuls are to be the only judges, and our courts are excluded from hearing the complaints of any persons whom the consuls may describe by those appellations.

The 14th article makes the certificate of a consul, conclusive proof of a man's being a Frenchman, and declares that he who shall make *such proof* shall not lose *for any cause whatever* the quality of subject.

That manifestation of so important a fact should depend wholly on such a certificate; that no counter proof should be offered and prevail, is really to make the consular chancery a court of record, (and that not only for judicial acts, but also for facts) against whole records, and even the copies of them, there can be no averment. This does not comport with the genius and spirit either of our constitutions or our laws, both of which secure to every inhabitant and citizen, the inestimable privilege of offering in our tribunals, every species of legal evidence that may tend to elucidate the merits of the cause before them.

But this is not the only objection to which this article is liable—one much more interesting is obvious.

Where such certificates appear, the person named in them is not to lose *for any cause whatever* the quality of subject, so that even legal naturalization is not to operate as a cause.

Library of Congress

That this is the true construction of that clause is evident from its expressly, referring to the 11th article of the treaty, and declaring that it shall serve as *an interpretation* thereof—Let us recur to that article.

After stating the privileges which persons of the two nations shall enjoy in each others country, it thus proceeds. “But it is at the same time agreed, that its contents shall not affect the laws made or *that may be made hereafter in France* against emigrations, which shall remain in all their force and vigour—And the United States on their part, or any of them, shall be at liberty to enact such laws relative to that matter, as to them shall seem proper.

Now let us collect into one point of view the different parts of the system, from their dispersed situation in the treaty and in the articles of this convention and see how it will operate.

(9) The king has a right to make what laws he may think proper respecting navigation and emigration.

Suppose a law directing that every passenger shall on his arrival in America immediately report himself to the consul or vice-consul nearest the place of his arrival, to the end that his name and description be entered in the consular registers.

The 10th article of the convention declares that they shall cause to be executed the respective laws, ordinances and rules concerning navigation, on board the said vessels—and that they may cause every passenger to be arrested.

Hence it will happen that every passenger will be noted and described in their books before such passenger can obtain naturalization; and if he should afterwards obtain it, the 14th article renders it avoidable by ordaining that “they who shall prove that they belong to the body of their respective nations by the certificate of the consul or vice-consul of the district, mentioning their names, surnames and place of their settlement *as inscribed in the*

Library of Congress

registers of the consulate, shall not lose, for any cause whatever in the respective states and domains the quality of subjects of the country of which they originally were; and the same article proceeds to declare, what is really not the fact, that this is conformable to the 11th article of the treaty; and as if conscious that the said article does not admit of such construction, it adds that it shall serve as an interpretation of it; that is, that it shall be so construed in future. That the 11th article does no more than declare the right of the king to make what laws he pleases against emigration, but there is nothing in it which says or seems to say, that his subjects producing the beforementioned certificates, shall not for any cause whatever lose that quality in our country.

Although the true policy of America does not require, but on the contrary militates against such conventions; and although your secretary is of opinion, that the convention as it now stands ought not to be ratified, yet as Congress have proceeded so far in the present instance, he thinks that instructions should be sent to their minister at Versailles, to state their objections to the present form; and to assure the king of the readiness of Congress to ratify a convention make agreeable to the scheme beformentioned; provided an article be added to limit its duration to eight or ten years, in order that practice and experience may enable them to judge more accurately of its merits, than can ever be done of mere theoretical establishments, however apparently expedient. **ALL WHICH IS SUBMITTED TO THE WISDOM OF CONGRESS. JOHN JAY.**

Convention related to consuls Done